...e Court, U.S.
F I L E D
FEB 8 1994
OFFICE OF THE CLERK

No. 93-1136

In The

Supreme Court of the United States

October Term, 1993

E. ELIZABETH TURNBULL, et al.,

Petitioners,

versus

THE HOME INSURANCE COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:

J. WALTER WARD, JR.
CHRISTOVICH & KEARNEY
2300 Pan American Life Center
New Orleans, Louisiana 70130
(504) 561-5700

STEVEN A. JACOBSON
SIMON, PERAGINE, SMITH & REDFEARN, L.L.P.
1100 Poydras Street
30th Floor – Energy Centre
New Orleans, Louisiana 70163-3000
(504) 569-2030

Counsel of Record for The Home Insurance Company, et al., Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioners have presented two separate questions for review (Petition at i). For the reasons indicated in this opposition brief, respondents submit that the following is a fair and accurate restatement of the real question presented for review:

> Did the district court abuse its discretion in refusing to consider a new legal theory raised for the first time in a supplemental memorandum in support of a motion for new trial when that theory required the assertion of legal issues not previously raised during six years of litigation, the introduction of additional evidence, anaylsis of a different law, and when the petitioners failed to provide an explanation for their failure to raise this issue during six years of litigation?

STATEMENT REQUIRED BY RULE 29.1

This Brief in Opposition to Petition for Certiorari is filed on behalf of The Home Insurance Company ("The Home") and The Graham Company ("Graham"). Home Holdings, Inc. is the parent company of The Home. Neither The Home nor Graham has any subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW i

STATEMENT REQUIRED BY RULE 29.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS AND JUDGMENTS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. The Decision Below is in no Way in Conflict With the Decisions of Other Circuits 3

2. In Deciding the Question at Issue, the Fifth Circuit Adhered to Settled Principles of Law in Reaching the Correct Result Based on Particular Facts 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Abbott v. Equity Group, Inc., 2 F.3d 613, *reh. den.*, 9 F.3d 105 (5th Cir. 1993) ..... *passim*

Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, *reh. den.*, 920 F.2d 259 (5th Cir. 1990), *cert. den.*, 114 S.Ct. 171, 126 L.Ed. 2d 131 (1993) 3

OTHER AUTHORITIES

Federal Rule of Civil Procedure 59 2

Rule 10b-9, 17 C.F.R. §240.10b-9 ..... 1, 2, 4, 5

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the District Court and Fifth Circuit Court of Appeals are contained in Petitioners' Appendix to their Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those contained in Petitioners' Appendix.

STATEMENT OF THE CASE

This Petition relates solely to the district court's disposition of the petitioners' belated attempt to interject a new legal theory into this litigation prior to the hearing on the petitioners' motion for new trial.[1] The petitioners' cursory statement of the procedural history of this issue is largely accurate, as far as it goes (Petition at 1-2). However, respondents believe it is necessary to more fully detail the nature and timing of the petitioners' late-filed claim.

Written reasons for the district court's grant of summary judgment in favor of The Home and Graham were

[1] The new theory was that respondents, The Home and Graham, had aided and abetted a violation of Rule 10b-9 issued under Section 10(b) of the Securities and Exchange Act of 1934. Petitioners have assumed, as they obviously must: (1) that a private cause of action exists under Rule 10b-9, and (2) that a cause of action exists for aiding and abetting a violation of Rule 10b-9. However, this Court has not yet determined whether Rule 10b-9 actually provides a private cause of action, a question also yet to be answered by the court below, and whether such a cause of action, if it exists, supports a claim for aiding and abetting. Pet. App. at 65, 66 n.58.

issued in January 1990. Over the following two years, the parties disputed amounts due The Home and, consequently, judgment was not entered against the petitioners until January 31, 1992. Petitioners then timely moved on February 10, 1992, for a new trial pursuant to Federal Rule of Civil Procedure 59. Petitioners' motion for new trial restated arguments raised in their pre-judgment motions and did not mention Rule 10b-9.

A claim based on Rule 10b-9 was not raised until March 27, 1992, when petitioner Turnbull's newly enrolled counsel filed a motion for leave to file a supplemental memorandum in support of the original February 10, 1992, motion for new trial.[2] On April 7, 1992, the parties argued the merits of the original motion for new trial which the district court denied. The district court, finding that the Rule 10b-9 claim had not been raised in six years of litigation, refused to consider this new theory. This chronology of events is set out in the opinion of the court below and is not disputed by the petitioners. Pet. App. at 17-18, 59-62.[3]

Respondents point out that the petitioners' "Statement of Necessary Facts" is nothing more than verbatim excerpts from briefs filed by the petitioners in the court below and, in any event, is irrelevant. The issue raised in the Petition, and the question before the court below, is not whether there were any "facts" in the record which might have supported a claim based on Rule 10b-9, but

---

[2] The other petitioners adopted the arguments made in the supplemental memorandum.

[3] In fact, petitioners concede in this Court that the 10b-9 theory was a new theory. Pet. at 2.

whether the court below abused its discretion in refusing to consider the legal claim that these facts allegedly support.

As the Fifth Circuit concluded:

> The court was under no obligation to permit appellants to interject a new legal theory, without explanation, after they had failed to do so during three years of discovery, two additional years between the court's granting summary judgment and entering judgment, and almost two months following that entry. Pet. App. at 66.

REASONS FOR DENYING THE WRIT

Petitioners have utterly failed to demonstrate the existence of any grounds for granting their petition.

1. The Decision Below is in no Way in Conflict With the Decisions of Other Circuits.

Petitioners apparently do not dispute that the district court is given discretion to consider new legal theories and that the proper standard for review is the abuse of discretion standard.[4] Rather, petitioners list a variety of circumstances or instances in which courts allegedly permitted consideration of new legal theories.

---

[4] See, *Lavespere v. Niagara Machine & Tools Works, Inc.*, 910 F.2d 167, *reh. den.*, 920 F.2d 259 (5th Cir. 1990), *cert. den.*, 114 S.Ct. 171, 126 L.Ed. 2d 131 (1993).

Petitioners' argument and supporting list of authorities misses the point since, in its decision below, the Fifth Circuit did not rule that district courts were precluded in all circumstances from considering legal theories raised for the first time in a post-judgment motion. To the contrary, the Fifth Circuit explicitly stated in a footnote that a district court may, in fact, use its "considerable discretion" to consider a new legal theory on a post-judgment motion. Pet. App. at 66, n.59.

The decision below simply held that, given the record before the district court and the undisputed facts concerning the timing and nature of the new legal theory, the district court was well within its discretion in refusing to consider petitioners' late-filed claim.

Indeed, petitioners do not dispute the Fifth Circuit's finding that they failed to mention Rule 10b-9 during three years of discovery, two additional years between the district court's granting summary judgment and entering judgment, and nearly two months following that entry of judgment. Nor do petitioners take issue with the Fifth Circuit's finding that they failed to provide an explanation for their failure to timely raise the 10b-9 issue.

Petitioners apparently place great emphasis on cases in which the new legal theory was purely one of law and required no new or amplified factual determination. The decision below can hardly be in conflict with these cases since petitioners' 10b-9 argument unquestionably required the introduction and analysis of new evidence.

As noted by the Fifth Circuit, Mrs. Turnbull attempted to file a supplemental memorandum with

attached deposition excerpts and exhibits in support of her motion for inclusion in the record for appeal purposes. Following that, Mrs. Turnbull attempted to file a second motion to supplement with approximately with one hundred fifty pages of deposition excerpts relating to her Rule 10b-9 theory. Pet. App. at 64, n.57. Obviously, if the Rule 10b-9 theory was purely one of law and required no new or amplified factual determinations, there would have been no reason for Mrs. Turnbull's two attempts to supplement the record with hundreds of pages of deposition excerpts and other materials.

2. In Deciding the Question at Issue, the Fifth Circuit Adhered to Settled Principles of Law in Reaching the Correct Result Based on Particular Facts.

The decision below applied accepted legal principles to special facts in order to reach the correct result. The Fifth Circuit held that the district court did not abuse its discretion in refusing to consider the 10b-9 argument given the applicable facts: the basis for the motion, the length of delay, and the lack of explanation for not having timely raised the issue. Pet. App. at 62-63.

Far from demonstrating any decisional conflict or aberration, this case turns on its particular facts and merits no consideration from this Court of a considered and correct application of settled rules of federal civil procedure.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Of Counsel:

J. Walter Ward, Jr.
Christovich & Kearney
2300 Pan American
Life Center
New Orleans, Louisiana
70130
(504) 561-5700

Respectfully submitted,

Steven A. Jacobson
Simon, Peragine, Smith
& Redfearn, L.L.P.
1100 Poydras Street
30th Floor – Energy Centre
New Orleans, Louisiana
70163-3000
(504) 569-2030

Counsel of Record
for The Home Insurance
Company, et al.,
Respondents